

**IN THE COURT OF COMMON PLEAS OF THE STATE OF  
DELAWARE IN AND FOR SUSSEX COUNTY**

TIMOTHY O'HARA,	)	
	)	
Movant/Defendant.	)	Case No. 0412003870
	)	
vs.	)	
	)	
STATE OF DELAWARE	)	
	)	

Submitted February 9, 2005  
Decided March 3, 2005

Timothy O'Hara, *Pro Se*, Movant/Defendant  
Carole Davis, Deputy Attorney General for the State of Delaware

**DECISION ON DEFENDANT'S  
MOTION FOR RECONSIDERATION**

The Defendant, Timothy O'Hara, moves this Court to reconsider his conviction for committing criminal mischief, in violation of 11 *Del. C.* § 811 (2004).

**BACKGROUND**

The Defendant was arrested on the charge at issue on December 6, 2004. The Court conducted a bench trial on February 8, 2005. After hearing all of the evidence and weighing the credibility of each witness, the Court found that the Defendant was guilty of Criminal Mischief for throwing a

brick through Alexis Smart's windshield. The Court immediately sentenced the Defendant to 30 days of incarceration suspended for 6 months of Level I probation with conditions that he pay restitution in the amount of \$175 to Alexis Smart, and have no unlawful contact with Alexis or Dana Smart.

The Defendant's motion sets forth facts and photographs in an attempt to bolster the credibility of the testimony of his eyewitness, James Long. In his Motion, the Defendant argues that Mr. Long indeed had a clear view of the altercation at issue in the trial. The State has filed a responsive pleading. This is the Court's decision after reviewing the trial transcript and the pleadings before it.

### **DISCUSSION**

Although the Defendant titled his motion a "Motion for Reconsideration," such motion is not recognized under the Court's Rules of Criminal Procedure. In essence, the Defendant requests this Court to grant him a new trial on the ground of newly discovered evidence. The Court's power to entertain new evidence in a postconviction proceeding is governed by CCPCR Rule 33.

Under Rule 33, the Court may grant the defendant a new trial if a new trial is "required in the interest of justice" or, if, the defendant presents the Court with newly discovered evidence. A motion for new trial, based on

newly discovered evidence, must establish three things. First, the defendant must show that the evidence will probably change the outcome if a new trial is ordered. *State v. Hamilton*, 406 A.2d 879, (Del. Supr. 1974); *see also*, *State v. Zdziech*, 1992 WL 12001067 (Del. Com. Pl. 1992). Second, the defendant must establish that the evidence has been discovered since the trial and that such evidence could not have been discovered by the exercise of due diligence prior to the trial. *Id.* Additionally, the defendant must demonstrate that the evidence is not merely cumulative or impeaching. *Id.*

In his motion, the Defendant sets forth facts and photographs in an attempt to show that an eye witness, Mr. Long's view was not obstructed when he observed the dispute between the Defendant and Dana Smart. The additional evidence was not proffered to the Court at trial. Essentially, the Defendant requests this Court to reevaluate the credibility of Mr. Long in light of this newly presented evidence.

It is unlikely that consideration of the new evidence would change the outcome of the defendant's conviction. At trial, Mr. Long's testimony was inconsistent. Long testified that he heard an argument at the Defendant's residence but, that he "really couldn't see" the dispute. In fact, Mr. Long stated that he could only see the top of the victim's head over the bushes that impeded his view. He further testified that at times he was on the other side

of his house further away from the altercation. Contrary to the preceding statements, Long also testified that he was on his porch smoking and could see the entire incident. The Defendant's motion attempts to bolster Mr. Long's testimony with evidence that the witness indeed had a clear view of the incident. The Court is not persuaded by such evidence. In weighing the witness's credibility, the Court may only consider the witness's actual perceptions. The Court appropriately judged Mr. Long's testimony and the newly presented evidence would have no effect on the Court's initial findings with regard to Mr. Long's testimony. Therefore, the newly presented evidence would probably not change the outcome of this case and the Defendant failed to satisfy the first element required to obtain a new trial.

The Defendant failed to establish that the evidence now presented was not available prior to trial. The photographs and physical description of the area from where the witness observed the incident were undoubtedly available to the Defendant before the trial. Because the evidence was easily accessible for the trial, presentation of such evidence at this juncture is an inappropriate basis for a new trial.

Finally, the evidence now submitted seeks merely to bolster the Defendant's witness's in Court testimony. Although Mr. Long testified that

his view of the incident was obstructed, the Defendant seeks to submit evidence that the witness had a clear view. This argument is insufficient to support a motion for new trial.

Admission of the facts and photographs presented in the Defendant's motion is unlikely to change the Defendant's conviction. Additionally, the evidence has not been newly discovered since the trial and could have been presented at the original trial. Finally, the Defendant seeks to admit the evidence merely to bolster a witness's in Court testimony and is therefore cumulative. Although the new facts and photographs are newly presented to the Court, they do not qualify as newly discovered evidence.

## **CONCLUSION**

For the foregoing reasons, the Defendant's Motion is **DENIED**.

**IT IS SO ORDERED**, this \_\_\_\_ day of March, 2005.

---

The Honorable Rosemary Betts Beauregard